CA NO. 04-99003

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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TERRY JESS DENNIS, by and through KARLA BUTKO, as Next Friend,

Petitioner-Appellant,

vs.

MICHAEL BUDGE, Warden, and BRIAN SANDOVAL, Attorney General of the State of Nevada,

Respondents-Appellees.

D.C. No. CV-S-04-0798-PMP-RJJ
(Nevada, Las Vegas)

Appeal from the United States District Court for the District of Nevada

APPELLANT'S PETITION FOR REHEARING EN BANC

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Terry Dennis, through Karla Butko as next friend, hereby petitions for rehearing en banc, following the decision by a panel of the Court filed on July 30, 2004. Fed. R. App. P. 35(b).

INTRODUCTION

Petitioner submits that the panel decision in this case conflicts with the controlling decisions of the Supreme Court with respect to next friend standing, Rees v. Peyton, 384 U.S. 312, 314 (1966) (per curiam), and Whitmore v. Arkansas, 495 U.S. 149, 166 (1990). It also conflicts with decisions of this Court, that continue to apply the Rees/Whitmore standard. E.g. Massie ex rel. Kroll v. Woodford, 244 F.3d 1192, (9th Cir. 2001); Miller ex rel. Jones v. Stewart, 231 F.3d 1248, 1250 (9th Cir. 2000); Comer v. Stewart, 215 F.3d 910, 915 (9th Cir. 2000); Brewer v. Lewis, 989 F.2d 1021, 1026 (9th Cir. 1993). Consideration by the full Court is therefore necessary to secure uniformity of decisions. Fed. R. App. P. 35(b)(1)(A).

Petitioner also submits that the issue of the standard of incompetence for purposes of allowing next friend standing is a question of exceptional importance, particularly considering the number of cases in which this issue has arisen. The panel decision purports to follow the standard of Rees v. Peyton, 384 U.S. at 314, holding that an inmate is not competent if his capacity to "make a rational choice with respect to continuing or abandoning further litigation" is "substantially affect[ed]" by mental

illness; and it also purports to follow the analysis of Rumbaugh v. Procunier, 753 F.2d 395, 398 (5th Cir. 1985), which holds that an individual is not competent if his mental illness "prevent[s] him from making a rational choice among his options." Petitioner submits that the panel decision is inconsistent with the decision in Rumbaugh, because it does not focus on whether Mr. Dennis' disorder is motivating his decision to seek execution. En banc review is therefore necessary to secure uniformity of decisions on this important issue. Fed. R. App P. 35(b)(1)(B).

ARGUMENT

1. The standard for allowing a next friend to litigate a habeas corpus petition on behalf of an inmate who is incompetent is:

> [W]hether [the inmate] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

Rees v. Peyton, 384 U.S. 312, 314 (1966) (per curiam): see Whitmore v. Arkansas, 495 U.S. 149, 166 (1990). In Rumbaugh v. Procunier, 753 F.2d 395, 398 (5th Cir. 1985), the Fifth Circuit stated the "rational choice" element of the test as:

> If the person is suffering from a mental disease of defect which does not prevent him from understanding his legal position and the options available to him, does that disease

> or defect, nevertheless, prevent him from making a rational choice among his options?

In this case, Dr. Thomas Bittker, the only psychiatrist who examined Mr. Dennis for the purpose of assessing his competence to seek his own execution, testified that Mr. Dennis' decision was "the product of his mental illness" and was not "volitional." XI ER (Excerpts of Record) 1859-1860. If the Rees/Whitmore standard has any meaning, this evidence must show that Mr. Dennis is not competent: however much an individual may have a cognitive or intellectual capacity to understand his situation, if his choice to seek execution is a function of his mental illness rather than his "volition," there can be no "rational" choice. See Rumbaugh v. Procunier, 753 F.2d 395, 398 (5th Cir. 1985).

The majority panel opinion purports to apply the Rees standard, but its analysis is really a non sequitur. The panel decision holds that

> [E]vidence showing that a prisoner's decision is the product of a mental disease does not show that he lacks the capacity to make a rational choice. It is the latter – not the former – that matters. The questions under Rees and Whitmore is not whether mental illness substantially affects a *decision*, but whether a mental disease, disorder or defect substantially affects the prisoner's *capacity* to appreciate his options and make a rational choice among them. Whitmore, 495 U.S. at 166; Rees, 384 U.S. at 314. A "rational choice" does not mean a sensible decision, or a decision that the next friend regards as reasonable. As the Supreme Court has pointed out, "[w]e have used the

> phrase 'rational choice' in describing the competence necessary to withdraw a certiorari petition, but there is no indication in that opinion that the phrase means something different from 'rational understanding.'" Godinez v. Moran, 509 U.S. 389, 398 n.9 (1993) (referring to Rees, 384 U.S. at 314). Thus, Whitmore does not ask whether the prisoner's choice is rational, but whether he has the capacity to have a rational understanding with respect to continuing or abandoning further litigation. If the mental disease, disorder or defect does not substantially affect this capacity, then the prisoner is competent under Rees and Whitmore.

Slip op. at 20-21.

With all due respect to the panel, this analysis is incomprehensible. Evidence that the decision is "motivated by mental illness," is "a product of mental illness," and is not "volitional" simply cannot be interpreted as relating only to the rationality of the decision itself: it can only be interpreted as showing that the capacity to make a choice rationally is affected by mental illness. The majority opinion apparently seeks to draw a distinction between when "mental illness substantially affects a decision" and when mental illness "substantially affects the prisoner's capacity" to make a decision. Slip op. at 20. It is difficult to see how this supposed distinction would amount to a difference, especially where, as here, the only evidence is that Mr. Dennis' decision is not even "volitional." On this point, detailed analysis breaks down: the majority opinion does not explain how evidence that Mr. Dennis is not

acting out of his own "volition" but is "motivated by his mental illness," can be construed as the majority opinion does. The opinion cites no decision of this Court, or any other, in which evidence that is as clear and uncontradicted as Dr. Bittker's testimony in this case was held not to establish the substantial effect of mental illness on a prisoner's decision to seek execution, and there is no such authority.[1] Even the concurring opinion acknowledges that the majority's analysis on this point is inconsistent with the Rees standard. Slip op. at 2, 10-11, 14-15 (Berzon, J., concurring in judgment).

Similarly, the panel's characterization of Dr. Bittker's report is incomprehensible. The panel states that the "argument that Dennis is incompetent because his decision is 'directly a consequence of the suicidal thinking and his chronic depressed state' is essentially that Dennis is incompetent because Dennis' reason for choosing to die is that he wants to die." Slip op. at 28.[2] The failure to

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[1] The closest case that could be cited is Massie ex rel. Kroll v. Woodford, 244 F.3d 1192, 1196 (9th Cir. 2001). But in that case, the only expert who had examined the inmate had done so eleven years before the next friend proceeding commenced, and essentially speculated as to the effect of the inmate's former suicidal tendencies or his current mental state. Here, by contrast, Dr. Bittker's examination of Mr. Dennis is fresh and his conclusion that the decision to seek death is a "product of his mental illness" is unequivocal.

[2] Dr. Bittker also testified that he did not believe that anyone who sought to give up his appeals in order to be executed would be suicidal and incompetent. XI (continued...)

distinguish between the effect of Mr. Dennis' mental disorder (which includes suicidal ideation and chronic depression) and just "want[ing] to die" leaves the Rees standard without any content at all.

The majority panel decision essentially eliminates consideration of the effect of the mental illness in the rationality of the decision-making process and assumes that only the inmate's cognitive, rational understanding of his options, rather than an ability to choose rationally among those options, satisfies the Rees and Rumbaugh standards. Slip op. at 20-21, 28. That holding is inconsistent with the language of Rees and Rumbaugh, as well as with the consistent decisions of this Court employing the Rees formulation.

This Court's decision in Comer v. Stewart, 215 F.3d 910 (9th Cir. 2000), demonstrates the flaw in the panel's reasoning. In Comer, this Court ordered a hearing to determine whether the inmate's decision to abandon his appeal was competent, in light of his documented irrational behavior. 215 F.3d at 916. But the Court also ordered consideration of whether the conditions in the prison rendered the inmate's decision involuntary, on the theory that the decision may have been coerced by those conditions. 215 F.3d at 917-918. The Comer decision demonstrates that the

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[2](...continued)
ER 1861.

inmate's mere cognitive understanding of his options is not enough. Rather, the decision must be a product of free will: free will uncoerced by the harshness of the prison conditions at issue in Comer; and free will not "motivated by mental illness" in this case.

The panel decision can only induce confusion over the application of the Rees standard, since the expert testimony in this case corresponds exactly to the Rees test. En banc review is necessary to maintain uniformity of decisions, not only in the decisions of this circuit but among the decisions of other circuits, such as Rumbaugh, on this important issue. Fed. R. App. P. 35(b)(1)(A, B).

The panel's focus on its novel view of the Rees standard resulted in little attention to the other evidence supposedly justifying the rejection of Dr. Bittker's uncontradicted testimony. It is clear, however, that the evidence consisted essentially of the district court's lay observation of Mr. Dennis, which is a virtually useless way to assess competence in any but the most obvious cases. The majority opinion pays lip-service to case law recognizing that lay people, including judges, will have difficulty assessing the meaning of the demeanor of mentally ill individuals. Slip op. at 31 n.7; see Lokos v. Capps, 625 F.2d 1258, 1267 (5th Cir. 1980) ("one need not be catatonic, raving, or frothing, to be unable . . . to relate realistically to the problems of his defense"); Strickland v. Francis, 738 F.2d 1542, 1552 (11th Cir. 1984); Lafferty

v. Cook, 949 F.2d 1546, 1555 (10th Cir. 1991) (untrained people often have difficulty recognizing signs of mental illness from defendant's demeanor). Here, Dr. Bittker testified, without contradiction, that Mr. Dennis would have every reason to attempt to appear as competent as possible, in order to gain his objective of being executed. XI ER 1853-1855. Dr. Bittker also testified that Mr. Dennis' disorder did not present flamboyant symptoms: Mr. Dennis is not "demented," "delirious," or "psychotic," XI ER 1858-1859.

The effect of the panel decision, however, will be that any individual who is not "catatonic, raving, or frothing" will be able to pass the panel's version of the Rees test merely by appearing rational, whatever the individual's underlying pathology may be. In short, the panel's decision exalts appearance - - and appearance to untrained lay people - - over the reality of uncontradicted expert testimony. The district court's canvass, XI ER 1804-1819, merely followed a script which Mr. Dennis had already heard at his change of plea, penalty hearing, and state court hearing. See IV ER 665-712; VII ER 1083-1088; XI ER 1804-1819; X ER 1615, 1624-1653. Mr. Dennis' "rational" assertion that he deserved to die for committing the murder, see slip op. at 23, stands unchallenged, because neither the state court nor the district court probed him about his statements to the police after the homicide that he deserved some "leniency" because he "did [the victim] a favor" by "put[ing] her

out of her misery." V ER 891; VI ER 912, 934-935, 937.[3] The panel's reliance on Mr. Dennis' supposed lack of current suicidal ideation, X ER 1658, disregards the other evidence. On general credibility principles, of course, there would be overwhelming reason to doubt Mr. Dennis' assertions, since he is a highly interested party seeking to obtain his execution by, paradoxically, claiming not to be suicidal. XI ER 1852. Dr. Bittker, by contrast, is a psychiatrist used mostly by prosecutors, selected by the state court, II Resp. ER 367; XI ER 1866, who has no conceivable axe to grind; and he reported Mr. Dennis' continuing suicidal ideation, and analyzed it as part of Mr. Dennis' plan to obtain a "reasonably humane death" which he was unable to accomplish by himself. Most important, Dr. Bittker reported (without contradiction) that Mr. Dennis had tried suicide with drug overdoses and gas because, in Mr. Dennis' words, "I don't do that self-mutilating stuff." X ER 1599. Given the absence of non-violent methods of suicide available in prison, it should be no surprise that Mr. Dennis' suicidal ideation has been replaced by a focus on having the State kill him; and Dr. Bittker testified that Mr. Dennis admitted to him that he was using the State as a "vehicle for suicide" because he was unable to kill himself. XI ER 1857.

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[3] The district court did not allow counsel to cross-examine Mr. Dennis directly. XI ER 1823-1825.

Under these circumstances, the rule adopted in this panel decision is simply a blank check for finding anyone competent who is not actually "raving." Nothing in Rees or Whitmore, or in any of this Court's decisions, permits such a result. En banc review should be granted to bring the decision in this case into line with the precedents of this Court and the Supreme Court.

2. The panel majority also justifies its decision on the basis of the presumption of correctness accorded to state court fact findings. 28 U.S.C. § 2254(e)(i). The panel cites Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir. 2004), which holds that the presumption does not apply when the state process is "defective," but it concludes that the state process here was adequate. Slip op. at 28-29. Most of the state process in this matter, from the time of the guilty plea to the proceeding on Mr. Dennis' competence, was conducted without the benefit of adversary litigation. With the exception of the aborted habeas corpus proceedings, all the other proceedings were conducted in conformity with Mr. Dennis' desire to be executed. Under these circumstances, and given the unexplored report of Dr. Bittker finding that Mr. Dennis' decision to seek execution is "directly a consequence" of his mental illness, the state court process could not result in fact findings entitled to the presumption of correctness, as the concurring opinion concluded. Slip op. at 19-20 (Berzon, J., concurring).

The panel's characterization of the state proceeding (like its view of the district court proceeding below) ignores the context in which the issues in this case arise. In Drope v. Missouri, 420 U.S. 162, 189 (1975), the Supreme Court held:

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

In this case, the primary artifact before the state courts was Dr. Bittker's report, which found that Mr. Dennis' wish for execution was "directly a consequence" of his mental disorder. The state courts' response to this expert opinion - - the only one before the state district court on the relevant issue, offered by an expert suggested by the Court - - was not to conduct a hearing adequate to explore the "wide range of manifestations and subtle nuances" that were involved in the case. Rather, the state district court assumed, without further inquiry, that Dr. Bittker was confused about the legal standard of competence, and it proceeded to rely on its own lay observations of Mr. Dennis' demeanor as the basis for finding him competent. See X ER 1618, 1658-

1659.

This Court should review this case en banc to clarify when a state proceeding is "defective" in the context of next friend standing, in conjunction with a coherent statement of the Rees standard of competence.

3. For these reasons, petitioner suggests that this Court rehear this case en banc, issue a stay of execution pending further proceedings, and reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately spaced 14-point. The total number of words is 2996.

Respectfully submitted this 3rd day of August, 2004.

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CERTIFICATE OF SERVICE

In accordance with Rule 5(b) of the Federal Rules of Civil Procedure, the undersigned hereby certifies that on this 3rd day of August, 2004, I deposited for mailing in the United States mail, first-class postage prepaid, and sent via electronic mail, a true and correct copy of the foregoing **APPELLANT'S PETITION FOR REHEARING EN BANC** to:

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